81

(3)

No. 07-323

FILED
JAN 14 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

ARCHDIOCESE OF WASHINGTON, *et al.*,
Petitioners,

v.

WILLIAM T. MOERSEN,
Respondent.

On Petition for a Writ of Certiorari to the Maryland Court of Appeals

---

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

KEVIN T. BAINE
Counsel of Record
LISA M. DUGGAN
CHRISTOPHER R. HART

WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434–5000

Attorneys for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

STATEMENT REQUIRED BY RULE 29.6

Petitioners' Rule 29.6 Statement was set forth at page ii of the Petition for a Writ of Certiorari, and there are no amendments to that Statement.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI	1
CONCLUSION	7

TABLE OF AUTHORITIES

FEDERAL CASES — Page

EEOC v. Roman Catholic Diocese of Raleigh, N.C., 213 F.3d 795 (4th Cir. 2000) 3
Hankins v. Lyght, 441 F.3d 96 (2d Cir. 2006) 6
Hankins v. New York Annual Conf. of the United Methodist Church, 516 F. Supp. 2d 225 (E.D.N.Y. 2007) 6
McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972), *cert. denied*, 409 U.S. 1050 (1972) 6
Rayburn v. General Conference of Seventh Day Adventists, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986) ... 2, 3, 6
Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 190 (2006) 3, 4

IN THE

Supreme Court of the United States

No. 07-323

ARCHDIOCESE OF WASHINGTON, *et al.*,
Petitioners,

v.

WILLIAM T. MOERSEN,
Respondent.

On Petition for a Writ of Certiorari to the Maryland Court of Appeals

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondent attempts to portray the issue in this case as a purely factual one—and to argue that the cases in which the ministerial exception were applied to persons in music ministry involved different facts. The question presented here, however, is not a factual one, but an important constitutional one: whether the ministerial exception applies to an organist who plays a visible role in a Church's liturgical services. There is an undeniable conflict among the courts on that question—and an undeniable conflict between the standard applied by the Court of Appeals in this case and the most frequently quoted standard for determining the applicability of the ministerial exception.

1. The prevailing view—first articulated by the United States Court of Appeals for the Fourth Circuit in *Rayburn v. General Conference of Seventh Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986)—has been that the ministerial exception applies to one whose "primary duties consist of . . . participation in religious ritual and worship." The Court of Appeals held that the exception did not apply to precisely such a person. There was no dispute that Mr. Moersen's primary duties were to "participat[e] in religious ritual and worship": his principal duties were to select and perform all of the organ music at liturgical services,[1] and to provide the musical accompaniment for all of the hymns. There was also no dispute that, in the Court of Appeals' words, "Moersen's music [was] central to the church's method of worship." Yet the Court held that the ministerial exception did not apply. That result is squarely at odds with the *Rayburn* standard, which has itself been widely adopted.

It is no answer for Respondent to argue that the Court of Appeals cited and purported to apply the *Rayburn* standard. As noted in the Petition, the Court of Appeals misquoted *Rayburn*—omitting the critical reference that primary duties consisting of "participation" in religious worship were sufficient to trigger the ministerial exception. *See* Pet. 7–8. And, misquotation aside, the decision of the Court

---

[1] Respondent states that he "did not plan or select the music associated with the worship at any of the liturgies." Brief in Opposition 3. But he ignores the affidavit he submitted to the Circuit Court, in which he acknowledged that his duties included "select[ing] whatever organ music that I performed." R. E49.

of Appeals in this case is irreconcilable with the *Rayburn* standard.

2. There is also a conflict between the decision of the Court of Appeals and the decisions of other courts faced with similar, albeit not identical, facts. *At least eight courts* have held that persons engaged in a Church's music ministry fall within the ministerial exception.[2] Until this case, *no court* had held to the contrary.

Moersen can argue that his role was more limited than the role of the plaintiffs in some or all of those cases. But the precise facts of those cases are less important than the broad principles that they apply—and the uniformity of results that they reach. Taken together, those cases establish a pattern from which the Court of Appeals' decision is a marked departure. It is impossible, for example, to reconcile the outcome of this case with the thoughtful analyses of Judge Wilkinson and Judge Posner in two relatively recent cases—*EEOC v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795 (4th Cir. 2000), and *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 190 (2006).

As Judge Wilkinson explained in the *Diocese of Raleigh* case, an organist "play[s] a prominent role in worship services," sufficient to trigger application of the ministerial exception, "[e]ven where [she does] not select the music herself"—because "the subtle judgments that accompany the presentation and interpretation of sacred music contribute to its spiritual effect." 213 F.3d at 803. And as Judge Posner noted in *Tomic*, the sort of reasoning that was

---

[2] See cases cited at pp. 16-18 of the Petition for a Writ of Certiorari.

persuasive to the Court of Appeals in this case—that "all [the organist] did was play music"[3]—overlooks the reality that how one plays the music "alter[s] the religious experience" of the congregation. 442 F.3d at 1040.

The differences in outcome between those cases and this case do not stem from any differences in the facts, but rather from a fundamental difference of opinion over how the law applies to the central fact that is common to all of these cases—namely, that an organist, though not the leader of the congregation, plays a direct and visible role in the liturgy that can significantly affect the quality of the church-goers' overall religious experience. Other courts have thought that is enough to trigger application of the ministerial exception. The Court of Appeals did not.

3. There is disagreement, more generally, over whether and to what extent an individual's duties must be supervisory to be considered "ministerial." The Court of Appeals appeared to conclude that a non-governance, non-teaching role is ministerial only if it is supervisory.[4] But that position would exclude Eucharistic ministers, lectors, cantors, altar servers and others who have highly visible roles in liturgical services.[5] Surely a Church has the right to decide for

---

[3] *Compare* App. 19a ("All [Moersen] needed was knowledge of how to play an organ.").

[4] As it explained its result, "we simply are not convinced that [Moersen's] role was supervisory in any respect, involved any form of church governance, or directly required the teaching or the spreading of the religious faith." App. 17a.

[5] Obviously many such persons are volunteers, not employees, but discrimination laws are not limited to employment relationships. One can easily imagine a claim, for example, that a Church discriminates against girls in the selection of altar

itself who may serve in those capacities. What makes the organist's role—and the role of the cantor, for example—important to a Church is not that he supervises others whose work affects the congregation, but that the way he performs his function directly affects the congregation.

4. Contrary to the respondent's contention, recognizing that the organist has a ministerial function would not mean that "virtually every employee of the church would fall into the ministerial exception." Brief in Opposition 1. Many, if not most, Church employees do not play visible roles in the Church's liturgical services. Many, if not most, could perform their duties—or fail to perform them—without any detectible impact on the religious experience of the faithful. Not all could claim, as the Court of Appeals acknowledged of Mr. Moersen, that what they do "is central to the church's method of worship." App. 18a. There are lines that can be drawn here between those whose services are purely secular and those whose services are infused with religious significance.[6] Contrary to the Court of Appeals' observation, one need not include the organ tuner in the ranks of minister to recognize that the one who performs sacred music during Church services—often alone and at other times in concert with the congregation—plays an integral role in the religious life of the church.

---

servers, or that a Church discriminates against older people in the selection of lectors.

[6] Courts have, in fact, drawn lines in other cases involving employees such as teachers and administrators. *See* Pet. 15, 19–21. The apparent inconsistency in results in some of these cases underscores the need for guidance from this Court.

5. The precise issue in this case is a recurring one, as evidenced by the number of reported cases raising the same issue. And the principles at stake are important ones, as Respondent concedes. Until now, there has been little reason for this Court to interfere in the continuing development of these principles in the state and federal appellate courts.[7] With the decision in this case, however—and the decision of the Second Circuit Court of Appeals in *Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006), that the ministerial exception has been displaced by the Religious Freedom Restoration Act ("RFRA")[8]—uncertainty has been introduced, and the need for guidance from this Court has become apparent.

The decision of the Court of Appeals was wrong. It invites judicial interference in one of the most protected areas of religious freedom—the selection of those who perform liturgical functions. It conflicts with the decisions of other courts and with the prevailing standard for determining when the ministerial exception applies. It injects confusion into an important area of First Amendment law that for

---

[7] Certiorari was denied in a series of cases in which the ministerial exception was applied. *See, e.g.*, *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 190 (2006); *Rayburn v. General Conference of Seventh Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), *cert. denied*, 409 U.S. 1050 (1972).

[8] Certiorari was not sought in *Hankins*, because that decision resulted in a remand to the district court, which held that RFRA foreclosed a minister's age discrimination claim. *Hankins v. New York Annual Conf. of the United Methodist Church*, 516 F. Supp. 2d 225 (E.D.N.Y. 2007). That decision is now on appeal to the Second Circuit.

three decades had seemed reasonably clear. The decision, therefore, warrants review by this Court.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

KEVIN T. BAINE
Counsel of Record
LISA M. DUGGAN
CHRISTOPHER R. HART

WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434–5000

Attorneys for Petitioners